LIEW CHEE HONG

v.

PP

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
MOHD GHAZALI YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
[CRIMINAL APPEAL NO: W-05-61-2004]
19 SEPTEMBER 2007

CRIMINAL LAW: *Dangerous drugs - Trafficking in cannabis - Trafficking in 1989 grams of cannabis - Prima facie case - Trial judge did not invoke statutory presumption for calling defence nor said that appellant deemed to be trafficking because of large amount of drug - Whether finding of prima facie case equivocal - Dangerous Drugs Act 1952, s. 39B(1)(a)*

CRIMINAL LAW: *Dangerous drugs - Trafficking in cannabis - Knowledge - Inference as to knowledge - Conduct of appellant - Throwing away drug and trying to escape on motorcycle - Court admitted that conduct could be appellant's reaction when taken by surprise but inferred knowledge nonetheless - Whether had misdirected itself - Whether offence only one of possession - Dangerous Drugs Act 1952, ss. 6, 39A(2), 39B(1)(a), 39B(2)*

CRIMINAL PROCEDURE: *Sentence - Possession of 1989 grams of cannabis - Appropriate sentence - Dangerous Drugs Act 1952, ss. 6, 39A(2)*

The appellant was convicted for trafficking in 1989 grams of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), and was sentenced to death, upon the evidence that he had thrown a bag containing the dangerous drug from a stationary motorcycle when confronted by the police. In this appeal, the appellant argued that his conviction was flawed as the learned judge, in ruling that a *prima facie* case had been made out against him, was equivocal whether the offence proved was one of possession or trafficking. The issue of equivocation apart, the appellant also contended that the evidence adduced, at the most, had only proved the offence of possession under s. 6 read with s. 39A(2) DDA, and not otherwise. It was not disputed that the learned judge, in making the aforesaid ruling and calling for the

appellant's defence, had adverted to the fact that the appellant was shivering when approached by PW10 and had tried to escape with the motorcycle – which conduct – according to the learned judge – indicated that the appellant had exclusive custody and control of the cannabis and had knowledge of the same. The facts however also showed that the learned judge, when considering the appellant's defence, had reverted to the same conduct, whereof he stated: (i) that the appellant was found in possession of the drug with knowledge being inferred from his conduct of throwing it out of the motorcycle and attempting to escape when the police tried to apprehend him; and (ii) that though such conduct could also be imputed to the appellant's reaction when taken by surprise, and not to any knowledge of drug being carried, the court was nonetheless inclined to make a contrary inference against the appellant. Upon such findings of the learned judge, before the learned justices herein, an issue arose as to whether the conviction and sentence of the court below on the facts and in the circumstances ought to be disturbed by the Court of Appeal.

Held (allowing the appeal):

Per Tengku Baharudin Shah JCA delivering the judgment of the court

(1) We do not agree that the learned judge was equivocal in his finding of a *prima facie* case. He clearly states that he found both possession and trafficking proven which should entitle him to call for the appellant's defence on the charge of trafficking. But the question is whether he was justified to so find on the evidence before him. (para 7)

(2) It is trite that when more than one inference can be drawn from a set of facts, then the court must adopt the inference most favourable to an accused person. The learned judge had therefore clearly misdirected himself in law when he inferred from the appellant's conduct that the appellant knew about the drug wrapped in Chinese newspaper inside P14 when the same conduct, as conceded by the learned judge, could also infer otherwise. (para 12)

(2a) Minus the wrong inference of the learned judge, the prosecution case is left with custody and control of the drug by the appellant which established fact would attract the statutory presumption of possession under s. 37(d) DDA. Such presumed possession would not attract the presumption

of trafficking under s. 37(da) DDA as that applies only if the drug is found in the appellant's possession and not when he is presumed to be so found as here. The learned judge had therefore erred in calling for the appellant's defence as he did. (para 13)

(3) The prosecution had only established a case of possession and not of trafficking. Consequently, we would set aside the conviction and sentence, substitute same with a conviction under s. 6 read with s. 39A(2) DDA and sentence the appellant to 20 years' imprisonment and 10 strokes of the rotan. (paras 14, 15 & 16)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah disabit kerana mengedar 1989 gram cannabis di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'), dan dihukum mati, atas keterangan bahawa beliau telah melempar beg yang mengandungi dadah berkenaan dari sebuah motosikal yang berhenti apabila bersemuka dengan polis. Dalam rayuan di sini, perayu berhujah bahawa sabitan adalah cacat oleh kerana yang arif hakim, dalam memutuskan bahawa kes *prima facie* telah dibuktikan terhadapnya, tidak pasti sama ada kesalahan yang dibuktikan kesalahan memiliki ataupun kesalahan mengedar. Selain isu ketidakpastian, perayu juga berhujah bahawa keterangan yang dikemukakan, paling tinggipun, hanya membuktikan suatu kesalahan memiliki di bawah s. 6 ADB dibaca bersama s. 39A(2) di situ. Adalah tidak dinafikan bahawa yang arif hakim, dalam membuat keputusan di atas dan memanggil perayu untuk membela diri, telah menimbang fakta bahawa perayu menggigil apabila didekati SP10 dan cuba melarikan diri dengan motosikal – kelakuan mana – menurut yang arif hakim – menunjukkan bahawa perayu mempunyai jagaan dan kawalan ekslusif terhadap dadah serta mempunyai pengetahuan mengenainya. Apapun, fakta juga menunjukkan bahawa yang arif hakim, sewaktu mempertimbang pembelaan perayu, telah merujuk kepada tatalaku yang sama sambil berkata: (i) bahawa perayu didapati mempunyai milikan dadah dengan pengetahuan diandaikan dari tatalakunya membuang dadah dari motosikal dan mencuba untuk melarikan diri ketika hendak ditangkap oleh polis; dan (ii) bahawa walaupun kelakuan sedemikian boleh juga berbangkit dari reaksi perayu yang terkejut, dan bukan kerana pengetahuannya mengenai dadah yang dibawa, mahkamah merasakan wajar untuk membuat anggapan sebaliknya terhadap perayu. Atas dapatan-dapatan yang arif hakim ini, di

A hadapan yang arif hakim-hakim di sini, isu berbangkit sama ada sabitan dan hukuman yang dibuat oleh mahkamah di bawah dalam halkeadaan yang wujud harus diganggu oleh Mahkamah Rayuan.

Diputuskan (membenarkan rayuan)

B **Oleh Tengku Baharudin Shah HMR menyampaikan penghakiman mahkamah:**

(1) Kami tidak bersetuju bahawa yang arif hakim tiada kepastian dalam mendapati wujudnya kes *prima facie*. Beliau menyatakan dengan jelas bahawa beliau mendapati milikan dan pengedaran telah dibuktikan sekaligus membolehkan beliau memanggil pembelaan perayu atas pertuduhan pengedaran. Persoalan yang timbul adalah sama ada beliau berjustifikasi untuk mendapati sedemikian berdasarkan keterangan yang ada di hadapan beliau.

(2) Sudah menjadi kelaziman bahawa bilamana lebih dari satu inferens boleh dibuat dari fakta-fakta, maka mahkamah hendaklah menerima pakai inferens yang paling bermanfaat kepada tertuduh. Yang arif hakim dengan itu jelas telah tersalah arah akan dirinya di sisi undang-undang apabila membuat inferens dari tingkah laku perayu bahawa perayu tahu mengenai dadah yang dibungkus di dalam suratkhabar Cina P14 sedangkan tingkah laku yang sama, seperti yang diakui oleh yang arif hakim, boleh juga membangkitkan andaian sebaliknya.

(2a) Tanpa inferens salah oleh yang arif hakim, yang tinggal pada kes pendakwaan hanyalah bahawa jagaan dan kawalan dadah oleh perayu fakta mana akan menarik anggapan milikan di bawah s. 37(d) ADB. Anggapan milikan sedemikian tidak boleh membangkitkan anggapan mengedar di bawah s. 37(da) ADB kerana peruntukan tersebut hanya terpakai jika dadah dijumpai dalam milikan perayu dan bukannya bila ia dianggap dijumpai begitu seperti dalam kes ini. Yang arif hakim dengan itu khilaf dalam memanggil pembelaan perayu seperti yang dibuatnya.

(3) Pendakwaan hanya membuktikan kes milikan dan bukannya pengedaran. Oleh itu, kami mengenepikan sabitan dan hukuman, menggantikannya dengan sabitan di bawah s. 6 ADB dibaca bersama s. 39A(2) dan menjatuhkan hukuman 20 tahun penjara dan 10 sebatan rotan ke atas perayu.

Case(s) referred to:
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 37(d), 37(da), 39A(2), 39B(1)(a), (2)

For the appellant - Karpal Singh; M/s Karpal Singh & Co
For the PP - Teo Say Eng DPP

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-10-95]

Reported by WA Sharif

JUDGMENT

Tengku Baharudin Shah JCA:

Introduction

[1] The appellant's appeal is against his conviction and death sentence for trafficking in dangerous drug (1989 gram of cannabis) (the drug) at a bus stop near Sekolah Menengah Kebangsaan Jinjang Utara, Kuala Lumpur on 12 February 2002, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 (DDA). He was arrested on a motorcycle bearing registration number WJC 360 which had stopped at the bus stop where Chief Inspector Tansli Mering (SP10) and his police team lay an ambush based on information received identifying the said motorcycle. SP10 and SP11, a member of his team, approached the appellant who, when SP10 introduced himself as a police officer, was alleged to have thrown away a red plastic bag (P14) containing the drug in 2 packets wrapped in Chinese newspapers, and attempted to escape with the motorcycle. He was however apprehended after a struggle.

The Appeal

[2] It was submitted before us that no *prima facie* case was made out against the appellant on the charge of trafficking at the close of the prosecution case. This is because the learned trial judge in his finding at that stage was equivocal whether it was possession or trafficking.

[3] We were referred to the learned judge's note (see p. 64 of the appeal record) to the effect that the prosecution had succeeded in proving *prima facie* that the appellant was in possession of and was trafficking in the said drug and therefore called him to enter his defence on the charge under s. 39B(1)(a) DDA.

[4] It was further contended on the facts as found by the learned judge it was also unclear whether he found possession or trafficking, as in his grounds of decision he mentioned "evidence without inference" to show that the appellant had exclusive custody and control of the drug and also knowledge of it (see p. 86 of the appeal record). He did not appear to have invoked the statutory presumption of trafficking.

[5] It was also submitted that the learned trial judge simply found the appellant in possession of the drug on the motorcycle. Even that was by inference or presumption though the judge did not say so. Hence learned counsel urged upon us to reduce the charge to possession which be conceded was proven.

[6] The learned deputy contended that the learned trial judge did not invoke any of the statutory presumptions. The court relied on actual physical possession and based on the large amount of drug involved the appellant was deemed to be trafficking. We note that when submitting in the court below the prosecution relied on the presumption of trafficking under s. 37(da) DDA (see p. 62 of the appeal record).

Finding

[7] We do not agree with learned counsel that the learned judge was equivocal in his finding of a *prima facie* case. He clearly states that he found both possession and trafficking proven which should entitle him to call for the appellant's defence on the charge of trafficking. But the question is whether on the evidence before him he was justified to so find.

[8] The learned deputy is not wrong to say that the learned judge did not invoke any of the statutory presumptions because no such reference was made in his grounds of decision for calling the defence. But the learned judge also did not say anywhere that the appellant was deemed to be trafficking because of the large amount of drug.

[9] In calling for the appellant's defence, the learned judge merely said that he applied the test propounded by this court in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734. We take him to mean that he had subjected the prosecution evidence to maximum evaluation and asked himself the question "If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative, then no *prima facie* case had been made out and the accused would be entitled to an acquittal …" as submitted by learned counsel.

[10] The learned judge was satisfied that there was no breach in the chain of evidence relating to custody of the said drug after recovery and accepted the testimony of SP4 on the identity and weight of the same as they were unchallenged. He did not however state his finding on the testimony of SP10 which he merely narrated and found support from SP11's evidence apart from stating that they both saw the appellant shiver when approached by SP10, throw P14 from the motorcycle and try to escape with the motorcycle. With that the learned judge appeared to have made a finding of *prima facie* case that the appellant had exclusive custody and control of the cannabis in the charge and had knowledge of the same and that the court could, on the available evidence, convict him for trafficking under s. 39B DDA (see pp. 86-87 of the appeal record).

[11] We would not be wrong to assume that the learned judge accepted the prosecution's narrative of the case for in the later part of his judgment, when considering the defence, he states that the appellant was found in possession of the drug with knowledge being inferred from his own conduct in throwing it out of the motorcycle and attempting to escape when the police tried to apprehend him (see p. 91 of the appeal record). But the learned judge himself states immediately thereafter that though such conduct of the appellant could also be imputed to his reaction when taken by surprise, which conduct could not then infer knowledge of the drug being carried, he (the judge) was in all the circumstances of the case of the view that the court could also take the inference to the contrary, which he apparently did. He also inferred that the appellant was aware of the drug on the ground that anyone having possession of P14 would know its contents because of the loose packing in Chinese newspapers when there was no such evidence.

[12] It is trite law that when more than one inference can be drawn from a set of facts, then the court must adopt the inference most favourable to an accused person. The learned judge had therefore clearly misdirected himself in law when he inferred from the appellant's conduct that he knew about the drug wrapped in Chinese newspapers inside P14 when the same conduct, as conceded by the learned judge, could also infer otherwise.

[13] The prosecution case is thus left only with custody and control of the drug by the appellant which established fact would attract the statutory presumption of possession under s. 37(d) DDA. Such presumed possession would not attract the presumption of trafficking under s. 37(da) DDA as that applies only if the drug is found in the appellant's possession and not when he is presumed to be so found as in this case. See *Muhammed Hassan v. PP* [1998] 2 CLJ 170. The learned judge had therefore erred in calling for the appellant's defence as he did.

[14] As conceded by learned counsel for the appellant in his submission and indeed proven to the satisfaction of the learned judge in the court below, the prosecution only established a case of possession of the drug for the appellant to rebut, as such his defence should only have been called on a charge so reduced.

Conclusion

[15] In all the circumstances aforesaid we allowed the appeal and set aside the appellant's conviction and sentence and substituted the conviction with one under s. 6 DDA read with s. 39A(2).

[16] In assessing sentence, we considered the submission of learned counsel that the appellant was a young first offender but also took judicial notice that cases of this nature were rampant. To arrest the ensuing social problem and deteriorating drug abuse among the youth we felt that public interest would be best served by a deterrent sentence being imposed. We sent the appellant to prison for 20 years with effect from the date of his arrest and ordered that he be given the statutory minimum of 10 strokes of the rotan.